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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JESSE DOMINGUEZ, et al., Plaintiffs and Respondents, v. HOME DEPOT U.S.A., INC., Defendant and Appellant.	B161671 (Los Angeles County Super. Ct. No. LC053393)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen D. Peterson, Judge. Affirmed.

George H. Ellis and Andrea Lynn Rice for Defendant and Appellant.

Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, Roger L. Gordon, and Vincent Vallin Bennett for Plaintiffs and Respondents.

INTRODUCTION

This is a defense appeal taken from a judgment entered following a lengthy jury trial in a personal injury action based upon the failure of a ladder. The defendant raises claims of evidentiary and instructional error. We find no merit to any of these claims and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Jesse Dominguez sued Home Depot U. S. A., Inc. (Home Depot) after he was injured while working on a ladder that Home Depot had sold to his employer, Troyer Contracting and Roofing (Troyer). He asserted causes of action for strict liability (design defect) and negligence (failure to warn). His wife, Dora Dominguez, joined in the lawsuit, seeking compensation for loss of consortium.

The operative facts are the following.

On December 15, 1997, Troyer purchased the 16-foot Krause multimatic ladder from Home Depot in Cerritos, California.[1] The ladder has four sections, each of which has four rungs. The sections are connected by hinges on each side of the ladder's side rails. A release bar is connected to the left and right side hinges for each section. When the release bar is activated, it simultaneously unlocks the hinges, permitting one to move the various sections of the ladder into different configurations.

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[1] The ladder was manufactured by Krause Ladder Systems, Inc (Krause). Plaintiff named Krause as a defendant and Home Depot filed a cross-complaint against Krause. However, by the time of trial, Krause was bankrupt and therefore no longer a party. The parties agreed not to disclose the bankruptcy to the jury and, to instead, simply state Krause was "not in business."

On October 19, 1999, plaintiff[2] worked as a roofer for Troyer. The ladder was fully extended into its 16-foot straight ladder mode. Without any problem, plaintiff climbed up the ladder to access the roof followed by approximately six of his coworkers. The accident occurred soon thereafter when he tried to descend. He first placed his left foot on the ladder and then his right foot. When he attempted to take another step, the top section of the ladder folded back unexpectedly, causing him to fall to the ground and sustain serious injuries. Witnesses testified the top section of the ladder collapsed or folded as plaintiff had tried to descend.

Plaintiffs had two legal theories at trial. The first theory was strict liability based upon Home Depot's sale of a defectively designed product (the ladder). Plaintiffs advanced two arguments as to why the ladder was defective. The first was a design defect because the release bar had been placed where the user could inadvertently activate it by kicking, pushing, or otherwise coming in contact with it, thereby releasing or unlocking both hinge mechanisms on each rail simultaneously. The second was that the ladder was defective because it was one of 73,000 subject to a manufacturer's recall, a recall triggered by a finding that one of the bolts would disengage after extended usage and cause the ladder lock to fail. Plaintiffs' second theory was negligence. They claimed Home Depot had notice of the manufacturer's recall of the defective ladders but negligently failed to warn consumers of that danger.

The jury found in plaintiffs' favor on the theory of design defect but not on the theory of failure to warn. The jury awarded Jesse Dominguez $587,107 in economic damages and $230,000 in non-economic damages and his wife $20,000 for loss of consortium. In allocating comparative fault, the jury found plaintiff 5

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[2] All singular references to "plaintiff" are to Jesse Dominguez.

percent at fault, his employer 12 percent at fault, and Home Depot 83 percent at fault.

The trial court entered judgment, making the appropriate reductions in the award based upon the jury's comparative fault findings and a complaint-in-intervention filed by the provider of plaintiff's workers compensation benefits.

This appeal by Home Depot follows. Home Depot raises multiple contentions of evidentiary error and a claim that the court erred in denying five special jury instructions it submitted. All of these claims were made in its post-verdict motion for a new trial which the trial court denied. We likewise find no error to any of them and therefore affirm the judgment.

DISCUSSION

A. EVIDENCE OF OTHER ACCIDENTS

Home Depot first contends that the "admission of 'other accidents' for proof of defect and notice was improper and prejudicial and warrants reversal." (Capitalization omitted.) Although there was extensive pretrial litigation on the issue, Home Depot never obtained a ruling and never objected when the evidence was ultimately introduced at trial. We therefore conclude Home Depot has abandoned its right to pursue this claim of error on appeal.

Governing Legal Principles

The seminal decision in this regard is *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 121-122, which held that evidence of other accidents is admissible to prove a defective condition in a product. As one noted treatise explains: "[*Ault*] created an exception to the general rule on admissibility of

evidence of prior or subsequent accidents. This exception permits evidence of a prior or subsequent accident in a defective-product strict-liability case without a showing of similarity of circumstances or conditions between the other accident and the accident in question. The defect claimed must be a defect in the physical and mechanical characteristics of a product. The evidence of the prior or subsequent accident must establish that the product involved in that accident and the product involved in the accident in question possessed inherent similarities in their physical and mechanical characteristics. Finally, the evidence must establish that the two products possessed similar defects in their physical and mechanical characteristics that caused the two accidents. If these conditions are satisfied, it does not matter that the two accidents may have occurred under substantially different circumstances or conditions. In such a case, the focus is not on the accidents themselves but on the inherent similarity of the physical and mechanical properties of the allegedly defective products." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Relevancy: General Principles, § 21.67, pp. 324-325; see also *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 555.) A showing of similarity between the products is sufficient to permit introduction of other accidents. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404.) Whether there is a showing of sufficient similarity is a question the trial court must determine and its ruling is reviewed for abuse of discretion. (*Id*. at p. 404.)

Factual Background

Prior to trial, plaintiffs proffered a list of 72 ladder accidents they sought to admit into evidence. Home Depot filed opposition, seeking a pretrial hearing to determine the admissibility of this evidence. Over three days, the court heard argument as to the admissibility of this evidence. During the course of these hearings, plaintiffs' counsel referred to and read from pleadings and discovery

taken in other cases (answers to interrogatories, deposition testimony) to explain why he believed they involved similar ladder accidents.

The court ultimately ruled: "With respect to unfettered, unlimited admissibility of collapse cases, I've concluded that that evidence would not be admissible, with some exceptions I'm going to outline, under [Evid. Code, §] 352 because a general collapsibility risk is not seriously in issue in this case. [¶] What is more specifically an issue is whether the accident was caused . . . as alleged by the plaintiff. If all of these other accidents involving Krause ladders were to be admitted on the theory of knowledge or notice of a risk, because not all of those risks implicate a product defect, the defendant in a case like this would have to prove up the details of each such accident, and that would result in a substantial consumption of time. The probaty [*sic*] of that evidence is small . . . because some collapsibility risk is not seriously open to question here. And emphasis on collapsibility cases or other ladder accidents in general diverts focus from the true causation issue here. [¶] *So to be admissible, I will require evidence that would be sufficient to support a jury finding that the cause was similar to inadvertent release or the recall ladder bolt disengagement defect*." (Italics added.) At another point in the hearing, the court indicated it had "simply given the guidelines" as what evidence it would permit.

Plaintiffs intended to introduce this evidence through deposition testimony given by individuals in out-of-state lawsuits. Defense counsel asked which of the 72 ladder accidents they intended to utilize because "there are foundational and relevance questions as to each and every document." The court noted there "are some admissibility questions raised by these instances" but that "similar other accidents could be admissible subject to the laying of proper foundation and getting over hearsay objections but as a matter of relevance could be admissible on the issues of causation and defect provided that it can be shown that the cause of

the other accident was similar, that is to say, evidence from which the jury could find the other accident to be similar to inadvertent release or bolt disengagement or the combination of those." The court observed that "[o]ne issue that may arise is [the defense] complaint that the deposition transcripts are not certified by the court reporter. So if the objection is going to be pressed, that can be a problem with some of these deposition transcripts."

In response, plaintiffs' counsel agreed to limit the number of other accident cases he would present. At no point during this hearing did defense counsel ask the court to rule immediately about the admissibility of evidence of any particular accident(s). The minute order for that day (March 28, 2002) simply recites: "Court and counsel continue discussing admissibility of evidence."

A subsequent pretrial minute order for April 17, 2002 states: "Court and counsel continue discussing pretrial issues regarding proposed witnesses and exhibits and admissibility of deposition." The record on appeal does not include a reporter's transcript of that day's proceedings.

During trial, plaintiffs' counsel informed the court: "We have some witnesses that are going to appear by way of reading of the deposition because they're out of the state." The court explained to the jury how the deposition testimony would be presented and that it constituted evidence for it to consider. *Defense counsel made no objections to the introduction of the deposition testimony.* Instead, when the court asked if defense counsel wanted the page and line of the deposition testimony referenced, he simply replied: "I don't need that, as long as counsel is reading the same ones that were in the pretrial hearings,[3] then I don't need to confuse things by page and line. I do wish that what we

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3 The deposition testimony read at trial involved four individuals who were referenced in the pretrial hearings.

discussed at the lunch hour be part of the record, however." The court responded: "Yes, I understand. We've gone over this prior to trial and we need not repeat the proceedings concerning admissibility of evidence." Deposition testimony from four individuals involved in ladder accidents was then read into the record.

Discussion

Home Depot now contends the "other accidents" were not sufficiently similar to plaintiff's accident and that even if they were, the evidence offered in form of the deposition testimony was not properly authenticated and was inadmissible hearsay. We do not reach the merits of any of these arguments because the present record does not indicate Home Depot preserved these issues in the trial court. In other words, there is no ruling for us to review.

Home Depot's motion in limine requested "an Evidence Code § 402 hearing establishing evidence and the foundation for the submission to the jury of any other claims, accidents or lawsuit regarding Krause ladders." Consequently, the court, on three separate days, held hearings in which the parties addressed this issue. The court ultimately held the evidence would be admitted *if* plaintiffs established the requisite similarity.[4] In addition, the court commented upon the potential hearsay and authentication issues raised by using deposition testimony. The court specifically noted its ruling was a "guideline." This clearly indicates that the court presupposed that prior to the actual introduction of evidence, plaintiffs would make an offer of proof, Home Depot would object, and the court would rule. In addition, plaintiffs' counsel said he would cull from his list of 72 accidents the ones he wished to use at trial. Home Depot did not then ask the court to rule upon the

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[4] If Home Depot's contention is an attack on that *preliminary* ruling, it clearly lacks merit. That ruling properly tracks the governing legal principles we set forth earlier.

admissibility of a particular accident. Consequently, the record does not support Home Depot's present claim that the court "refused [its] request for a preliminary hearing on those issues pursuant to Evidence Code section 402." (Underlining omitted.)

When during trial plaintiffs sought to introduce deposition testimony describing four ladder accidents, Home Depot made no objections. Home Depot did not objection there was insufficient similarity. Home Depot did not object that the deposition testimony was inadmissible hearsay. Home Depot did not object that the transcripts of the deposition testimony were insufficiently authenticated. Home Depot's failure to press its earlier raised objections or to seek a ruling from the court on those points constitutes an abandonment of all of those objections and a waiver of its right to assign on this appeal any claim the court erred in permitting plaintiffs to introduce this evidence.[5], [6] (*Campbell v. Genshlea* (1919) 180 Cal. 213, 220; *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129; *Fibreboard Paper*

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[5] When the deposition testimony was introduced, defense counsel made an oblique reference to a "lunch hour" discussion. Because there is no record of that "discussion," there is nothing to review in that regard. (See *Waller v. Waller* (1970) 3 Cal.App.3d 456, 464.)

[6] Home Depot renewed this claim in its motion for a new trial. The trial court ruled: "With respect to the admissibility of other accidents, I haven't changed my mind about the admissibility since we conducted extensive pretrial hearings into those matters. Whether you articulate the other accidents general standard of admissibility, as substantially similar, or significantly similar, in this case I think all that was received, except for perhaps for the purpose of notice, was substantially similar. [¶] And even as to the notice items, I believe they would meet that test as well. All of the other accident evidence consisted of cases where there was at least a sudden and spontaneous hinge system failure without significant operator error or other satisfactory explanation." If these comments are a reference to a *specific ruling* about the accidents described in the deposition testimony, neither party has cited where in the record that ruling is to be found. It is not our responsibility to search the voluminous record for it. (See, e.g., *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

Products Corp. v. East Bay Union of Machinists (1964) 227 Cal.App.2d 675, 698; and Evid. Code, § 353, subd. (a).)

B. Testimony of Dr. Martin Siegel

Plaintiffs called Dr. Martin Siegel, a mechanical engineer, as an expert witness to testify the ladder was defective. Without any objection from the defense, Dr. Siegel explained that his opinion was based, in part, upon his review of other accident cases involving the ladder. On cross-examination, Dr. Siegel explained he had reviewed between 18 to 20 such cases. When asked to give the names of those cases, he replied: "I can't give you the names of all of them, but I can give you some of them." Dr. Siegel then gave five names, four of which were the cases about which deposition testimony had already been read into evidence. He explained those "were most similar to this case in that [those plaintiffs] claim[ed] that they hit the bar and it released the locks." He had not brought his files on the cases to court; the files were at his home.

After Dr. Siegel had completed his testimony, counsel for Home Depot moved to strike "all the testimony of Mr. Siegel with regard to the other cases because we don't know the documentation upon which Mr. Siegel relied." Home Depot urged that Dr. Siegel could have violated the court's ruling limiting the number of prior accidents about which plaintiffs could produce evidence. The court denied the motion. It explained: "I haven't said that any expert in this case may not refer to something or other. I don't control the experts and how they formulate their opinions in that regard. [¶] . . . to try to state it simply, an expert need not base his opinion on admissible matter. An opinion may not be based upon improper matter, but I have no evidence before me upon which I could find or infer that [Dr. Siegel's] opinion was based upon improper matter." The court

explicitly stated it had never issued a ruling limiting the prior accidents upon which an expert could base an opinion.

In completely conclusory manner, Home Depot now asserts the denial of its motion to strike Dr. Siegel's testimony[7] was "clearly erroneous and unfairly prejudicial" because "there was no foundation for his testimony, which made [it] inadmissible" and because "his testimony violated the trial court's order." Home Depot's assertion lacks merit. An expert may rely upon hearsay, such as case files about other accidents, in giving an opinion. (Evid. Code, § 801, subd. (b).) It was proper for Dr. Siegel to explain his opinion was based, in part, upon his review of such files. (Evid. Code, § 802.) Dr. Siegel's ability to recall the names or details of those case files went to the weight of his testimony, not its admissibility. Defense counsel could have pursued this issue during its cross-examination of Dr. Siegel but chose not to do so, a point the trial court noted when it denied Home Depot's motion for a new trial that was partially based on this complaint about Dr. Siegel's testimony.[8]

C. Evidence About Krause's Recall of the Ladders

In June 1998, Krause announced a recall of 73,000 ladders in the United States and Canada. The recall notice stated, in pertinent part: "A hinge on some ladders manufactured between December 1, 1997 and May 22, 1998 may unlock during use, causing the ladder to collapse. This may result in serious injury or

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[7] Home Depot's claim that it also "moved to compel Mr. Siegel to bring his list to court" is not supported by the portion of the record cited in its brief.

[8] The court stated: "And we had the list [of the other accident cases] here [in court], and the expert [Dr. Siegel] could have been shown the list and had that list gone into. But I think, for tactical reasons, that was not done, very understandable tactical reasons."

death. [¶] Potentially affected ladders are: . . . 16-foot MultiMatic -- Model No. 121499. [¶] . . . [¶] Krause sells ladders nationwide through major home improvement chain stores such as Home Depot[.]"

As set forth earlier, the ladder plaintiff was using when he was injured was purchased by his employer on December 15, 1997, at the Home Depot located in Cerritos. It was the same model as embraced in the recall. Home Depot sought a pretrial ruling precluding any reference at trial to the recall. Following a hearing, the court denied the motion. Home Depot now urges that ruling was error "without requiring that plaintiff[s] make a preliminary factual showing that [plaintiff's] ladder was one of the recall ladders." (Underlining omitted.) We disagree. In the pretrial proceeding, plaintiffs produced sufficient evidence from which a reasonable jury could find in their favor on the issue. The court therefore did not err in permitting evidence of the recall at trial.

Factual Background

As explained in Home Depot's motion, the recalled ladders used a "powdered steel bolt [that] could under certain circumstances of repeated dynamic loading, become disengaged, causing the ladder lock to fail."

The ladder plaintiff had been using when he was injured was not available at the time of trial because it had been stolen from one of Troyer's job sites "a month or two after" his accident. Accordingly, the issue of whether that ladder was the subject of the recall could only be proved or disproved by circumstantial evidence. The starting point was to try to determine when the ladder plaintiff's employer had purchased on December 15, 1997, had been manufactured since the recall only embraced those manufactured *after* December 1. In that regard, plaintiffs offered invoices that established that on December 5, 1997 -- ten days before Troyer purchased its ladder -- Krause sent 672 16-foot multimatic ladders to Home

Depot's Fullerton warehouse (a warehouse which services the Cerritos store) and on December 10, 1997 -- five days before Troyer purchased its ladder --- Krause sent a 16-foot multimatic ladder to Home Depot's Cerritos store.

Plaintiffs also offered the deposition testimony of Brian Haubenschild, the individual Home Depot had designated as the person most knowledgeable, to establish Home Depot could not rule out the possibility that the ladder sold to plaintiff's employer had been subject to the recall. Haubenschild testified that an inspection of the serial number label attached to the ladder would establish whether that ladder was subject to the recall but that neither the paper work Troyer had in regard to its purchase of the ladder nor any documents in Home Depot's possession indicated whether the ladder sold to Troyer was subject to the recall. To show that the accident could have been caused by the particular defect that triggered the recall (disengaging bolt), plaintiffs offered the deposition testimony of John Ferguson, plaintiff's supervisor. Ferguson testified that approximately a week after the accident, he inspected the ladder and found that one of the pins did not lock into position as it should have when the ladder was extended. In addition, plaintiffs pointed to deposition testimony that the day of accident there had been heavy use of the ladder to suggest that the stress caused by that use could have caused the bolt to loosen, the very scenario that triggered the recall.

Home Depot urged that in the event the court admitted "evidence of the shipment of December 5, 1997," plaintiffs should not be able to argue the ladder was subject to the recall "without first presenting evidence in a hearing outside the jury's presence, that this 'meandering' effect [of the steel bolt] can and did occur in this accident." Home Depot proffered a detailed declaration from Dr. Mack Quan, a mechanical engineer. Based upon his review of deposition testimony describing the accident and Troyer's use of the ladder as well as his attempts to reconstruct

the accident, Dr. Quan opined the ladder plaintiff had used was not one of the recalled ladders.

The Trial Court's Ruling

The court ruled plaintiffs could present evidence to establish the ladder was subject to the recall.

At the first hearing held on this issue, the court explained: "[U]nder [Evid. Code, §] 403 I would have to determine that the evidence is insufficient to sustain a finding that the ladder in question is a recall ladder. If we have an invoice shipping recall ladders to the area, and if there is some method of the ladder getting to the Cerritos store, then I don't know how I could make a finding to exclude it under [section] 403." "I can't exclude the possibility that this ladder may be part of the [Dec. 5, 1997] shipment to Fullerton."

At the second hearing held on this issue, the court ruled: "I cannot exclude the recall ladder from being a possibility here. So I think the plaintiffs' evidence that this may be a recall ladder and that the recall ladder bolt disengagement defect is something that the jury will have to decide, whether it played any part here." Noting that one of plaintiffs' theories was that Home Depot had been negligent in not warning of a defective product, the court rhetorically asked: "If the jury finds that this was a recall ladder and that it was defective, couldn't the jury find that Home Depot had not sufficiently contacted the purchasers of recall ladders to warn them?"

Trial Evidence

At trial, plaintiffs offered the evidence set forth above. In addition, they called as an adverse witness Krause's former controller, Edward Hansen. As the controller, Hansen assisted in the handling of product liability claims brought

against Krause. He testified in detail about the recall. Plaintiffs also offered expert testimony to support the claim the accident was caused by a recalled ladder.

Home Depot's new trial motion attacked the use of the recall evidence. The court ruled: "The evidence that the ladder is a recall ladder, I think, is there. There was substantial evidence to support a finding by the fact finder, if that's what the jury thought, in that regard."[9]

Discussion

Evidence about the recall was only relevant *if* the ladder involved in plaintiff's accident was one of the recalled ladders. While it was ultimately a question for the jury to determine that preliminary fact (plaintiff used a recalled ladder), Home Depot's motion in limine asked the court to decide first whether or not there was sufficient evidence to even present the question to the jury. As one treatise explains: "In determining admissibility in cases in which the jury ultimately determines a preliminary fact . . . , the judge must admit the proffered evidence if any showing of preliminary facts is made 'sufficient to sustain a finding' of their existence. (Ev.C. 403(a).) The judge cannot weigh the opponent's evidence and resolve the conflict against admissibility; this is the jury's function. The judge can only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable determination by the jury. (Ev.C. 402, Comment, Ev.C. 403, Comment.)" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 52, p. 85.)

In this case, the court did not err in ruling there was sufficient evidence to permit the jury to decide the ultimate question of whether the ladder was one

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9 On this appeal, Home Depot does *not* contend the evidence is insufficient to support the jury's finding the ladder was defective.

covered by the recall. Five days after Krause began manufacturing the recalled ladders and ten days before plaintiff's employer purchased the ladder, Krause sent 672 ladders of the same model involved in this case to Home Depot's Fullerton warehouse. Ten days after Krause began manufacturing the recalled ladders and five days before plaintiff's employer purchased the ladder at the Cerritos store, Krause sent a ladder of the same model involved in the accident to the Cerritos store. Since Home Depot was unable to present any evidence to specifically preclude the purchased ladder as being a recalled ladder, this was circumstantial evidence from which a reasonable jury could find in plaintiffs' favor on the issue. While it is true that Dr. Quan's declaration averred the accident happened in a manner inconsistent with the defect found in the recalled ladders, Ferguson's and plaintiff's deposition testimony suggested a contrary conclusion. That conflict was for the jury to resolve at trial; it was not a basis upon which to preclude the jury from reaching the issue. (See *LeGrand v. Yellow Cab Co.* (1970) 8 Cal.App.3d 125, 133 ["The sole duty of the trial judge was to decide whether there was sufficient evidence to submit the question to the jury."]) Home Depot therefore mischaracterizes the record when it claims: "[T]he trial court refused to require [plaintiffs] to produce any evidence that the recall scenario was present in the subject ladder" and "the trial court refused to press the [plaintiffs] to show evidence that the recall bolt was a cause of this accident."

Home Depot also argues that since its liability is based upon being the seller of the ladder as opposed to the manufacturer, evidence of the recall was "irrelevant and unfairly prejudicial." This approach misses the mark. As a seller, Home Depot could be held strictly liable for injuries caused by a defective product it sold even if it was not involved in the design and manufacture of the product, one of the theories asserted by plaintiffs. (See, e.g., *Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 587; 3d Rest. of Torts, Products Liability § 20.) But the

plaintiffs also alleged negligence in the failure to warn of the danger after Home Depot became aware of the potential defect in the product (bolt could become disengaged after repeated use of ladder) as a result of the recall. In this case, after lengthy pretrial proceedings, the court properly concluded plaintiffs had offered sufficient evidence that Home Depot was aware of the recall to permit them to prove and argue the latter theory at trial.

D. Home Depot's Effort To Offer Contradictory Evidence on Recall

Home Depot contends "reversible error occurred" because the trial court improperly precluded it from offering evidence to show the ladder in question was not a recall ladder. The record does not support this claim.

Factual Background

In so far as this issue is raised by the parties' briefs, it is framed in the context of Home Depot's post-verdict motion for a new trial. We therefore begin with a discussion of that motion, its predicates, and plaintiffs' opposition thereto.

In the motion, Home Depot claimed "[j]ust as trial began, the Home Depot employees in California located documents" to prove "that the subject ladder was not a recall ladder" because "the first shipment of ladders which could possibly have had recall bolts . . . did not arrive in the Fullerton warehouse until the afternoon of December 15, 1997," the same day plaintiff's employer purchased the ladder. The motion further claimed: "The Court refused to permit HOME DEPOT to show the document or to refer to the document which showed that the subject ladder was not a recall ladder." (Neither of the parties' briefs provides citations to where in the record that ruling was made.) The motion then urged that notwithstanding the trial court's preclusion order, plaintiffs had "opened the door" to permit Home Depot to present this evidence but that the trial court had

erroneously refused to allow Home Depot to present it. The alleged "opening of the door" occurred during the following examination of Hansen, Krause's former controller.

Home Depot called Hansen as a witness during its defense case. During cross-examination of Hansen, plaintiffs' counsel questioned him about Krause's December 5th and 10th shipments of ladders to Home Depot.

> "Q. [Plaintiffs' counsel] And they [the ladders] were available to be shipped at 12-5 -- was available to be shipped on 12-5?
>
> "A. We made a shipment on 12-5, yes, sir.
>
> "Q. And you don't have any personal knowledge of that particular shipment in terms of when it got to the Home Depot -- correct? -- You don't know?
>
> "A. That's correct.
>
> "Q. You were pri --
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> "MR. ELLIS [Home Depot's counsel]: May we approach?
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> "THE COURT: Excuse us for a second.
>
> "MR. ELLIS: That may be premature.
>
> "THE COURT: Come on.
>
> "(There was a conference in chambers which was not reported.)
>
> "THE COURT: Okay. The last question and answer are stricken. The jury should disregard them."

Home Depot's new trial motion argued: "Mr. Hansen had been instructed that the Court had excluded the late document [that allegedly proved the accident ladder could not have been a recall ladder]. Mr. Hansen therefore said 'No' in

order to comply with the court's order. Upon hearing such a question, and answer, the attorney for Home Depot objected and in camera argued that the 'door had been opened.' The Court then struck the question and answer even though the plaintiff's attorney had obviously 'opened the door.' Therefore, the plaintiff's attorney was able to falsely represent to the jury that there were no records showing that the subject ladder was not a recall ladder and that Home Depot had no documents to show the accident ladder was not a recall ladder."

Plaintiffs' opposition to the new trial motion made several points. First, it argued the court's initial ruling to exclude the evidence was proper. They noted that in response to all of their pretrial discovery, Home Depot had consistently asserted it had no records to prove or disprove whether the subject ladder was a recalled ladder and that it was only when they "were more than three-quarters way through the presentation of their case" that Home Depot announced the "discovery" of these new documents. (Underlining omitted.) Plaintiffs next argued their counsel "unintentionally" asked Hansen the question which Home Depot claimed had "opened the door" and that any harm caused thereby had been cured when the court struck the question and answer and directed the jury to disregard it.

At the hearing on the new trial motion, the court ruled: "With respect to the documents that were produced by the defense late in the case, there was an abuse of the discovery process in failing to submit those documents in response to previous discovery requests. I'm not clear as to when those documents were first discovered [by Home Depot], but certainly the notice of the existence of those documents to plaintiff's counsel was too late in the case to provide a fair trial to the plaintiff. And it appears that there was a failure [by Home Depot] to conduct a reasonable search for the documents during the discovery phase of the case. [¶] . . . [¶] As to the question that [plaintiffs' counsel] asked [of Hansen] that I struck,

I was convinced at the time that he had asked that question without understanding its possible implications and was not attempting to put something in through the back door and was asking that question in good faith. And given the prior rulings and state of the evidence in the case, I think the only course of action open to me was to strike the question and answer that had been given at that point."

Discussion

Home Depot now argues: "The Court refused to permit HOME DEPOT to show [Hansen a] document which showed that the subject ladder was not a recall ladder[.]" We are unable to even begin to reach the merits of the claim given Home Depot's patently deficient presentation on this appeal.

Because Home Depot has not provided any record citations for when the initial preclusion order was made, it is impossible to determine whether that ruling was proper. Similarly, it is impossible to determine whether plaintiffs' cross-examination of Hansen in any manner violated that ruling. "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations. [Citations.]" (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) Because Home Depot has failed to discharge that duty, we do not consider the issue. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239.)

Furthermore, the proceedings conducted after Home Depot objected during Hansen's cross-examination were not reported. Consequently, it is not possible to even begin to evaluate the propriety of the court's ruling striking the question and answer since an appellate court is "confined in its review to the proceedings that took place in the court below and *are brought up for review in a properly prepared record on appeal.* [Citation.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 328, p. 369, italics added.)

E. Admission of Consumer Products Safety Commission Reports

Home Depot contends that reports generated by the Consumer Products Safety Commission (a federal agency) that described the problems in the recalled ladders were improperly admitted into evidence because the reports were not authenticated and were hearsay not within any exception. The contention is not properly before us because Home Depot's prolix discussion of the issue fails to include any record citations to any rulings made by the trial court on this issue. The few portions of the record cited by Home Depot are simply pretrial hearings in which Home Depot raised its concern about the authentication and hearsay issues. However, the court made no ruling at that point. Home Depot has failed to provide record cites for when the documents were subsequently admitted into evidence, Home Depot made the objections it now raises, plaintiffs responded to the objections, and the trial court overruled the objections.

Any statement in a brief referring to a matter in the record must be supported by a citation to the record. (Cal. Rules of Court, rule 14(a)(1)(C); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29-30; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.) Here, the record consists of a reporter's transcript of more than 3,500 pages and a clerk's transcript in excess of 2,700 pages. "Appellate courts will not act as counsel for either party to an appeal and will not assume the task of initiating and prosecuting a search of the record for the purpose of discovering errors not pointed out in the briefs. It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby. [Citations.]" (*Fox v. Erickson* (1950) 99 Cal.App.2d 740, 742.)

Because Home Depot has failed to provide the required record citations, the contention is waived. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301.)

F. Home Depot's Special Jury Instructions

Home Depot contends the court erred in declining to use five special jury instructions it submitted. We find no error. The proposed instructions were inaccurate statements of the law. The issue addressed by the instructions -- plaintiff's failure to read the instructions on the ladder -- was adequately covered by other instructions.

Factual Background

The ladder contained various instructional labels that stated, inter alia: "Danger, serious injury or death could result if all hinges are not locked during use"; "Make sure all hinges are locked before using this ladder"; "Do not use this ladder if color locking bolts do not lock in place"; "Adjust all hinges before climbing or using ladder. Never release the hinge lock or attempt to reposition hinges while climbing on the ladder"; and "Warning, failure to follow all instructions may result in serious injury."

Plaintiff testified that before the accident he did not read any of those | labels. Plaintiff offered evidence that it was not unusual for a worker not to read the instructional labels on a ladder.

Ferguson, plaintiff's supervisor, testified that in his opinion nothing in these labels cautioned the user that after properly setting up the ladder, he could accidentally activate the release bar and cause the ladder to collapse.

Home Depot requested the following five special jury instructions:

> "If you find that plaintiff failed to read the warning labels on the Krause ladder he was using at the time of this accident, you are instructed that the warnings were not a cause of plaintiff's injuries."
>
> "If a warning inadequately or incompletely informs the user of a product of the danger in question, the inadequacy of the warning cannot have been a cause of the accident if the plaintiff did not read the warning at all."
>
> "If you find that plaintiff failed to read the warnings on the subject ladder, there can be no causal connection between the inadequacies of the warnings and plaintiff's injuries."
>
> "If you find that plaintiff failed to read the warnings on the ladder he was using, there is no causal connection between the warnings that accompanied the product and plaintiff's injuries."
>
> "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

The trial court declined to give the instructions. It explained: "I don't think those instructions correctly state the law in that they fail to consider the intellectual content of the warnings and they fail to consider, that is, take into account, the effectiveness of the warnings from a psychological or human factors perspective. Therefore, as stated, without incorporation of those concepts, they are not a correct statement of the law."

However, pursuant to Home Depot's request, the trial court instructed the jury as follows:

> "Comparative fault is negligence on the part of a plaintiff which combining with the negligence of a defendant or with a defect in a product or with the negligent conduct of others contributes as a cause in bringing about the injury.

> "Comparative fault, if any, on the part of plaintiff does not bar recovery by the plaintiff against the defendant but the total amount of damages to which plaintiff would otherwise be entitled shall be reduced by the percentage that plaintiff's comparative fault contributed as a cause to plaintiff's injury." (BAJI No. 9.03.)
>
> "In order to determine the proportionate share of the total fault attributable to the plaintiff, you will of necessity be required to evaluate the combined negligence of the plaintiff and the negligence or defective product of the defendant and of all other persons whose negligence contributed as a cause to plaintiff's injury.
>
> "In comparing the fault of such persons you should consider all the surrounding circumstances as shown by the evidence." (BAJI No. 14.91.)

In addition, the court submitted five standard instructions defining and explaining negligence. (BAJI Nos. 3.10, 3.11, 3.12, 3.13 and 3.16.)

In closing argument, Home Depot urged the warnings on the ladder were adequate and noted that plaintiff conceded he had not read any of them.

As set forth earlier, the jury's special verdict included a finding that plaintiff was 5 percent at fault.

Home Depot's new trial motion reiterated its claim that the court had erred in declining to submit its five special instructions. In denying the motion, the court stated: "With respect to the jury instructions on labeling, I think I made the rulings on the record at the time. Many of the defense instructions concerning labeling failed to take account of the doctrine of foreseeable misuse and did not correctly state the law regarding labeling."

Discussion

A party is, of course, entitled to instructions on every theory of the case supported by substantial evidence as long as the proposed instructions *correctly* state the applicable law. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) "Where a portion of a proposed instruction is erroneous, misleading or incomplete, the court may properly refuse the entire instruction, there being no duty on the court to cull out what is proper from what is not; nor is the court under a duty to modify such instruction or give others in lieu of it as long as the jury is properly instructed as to the law of the case. [Citations.]" (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 717.)

At bench, the court properly rejected Home Depot's five special instructions because the instructions were not accurate statements of the law. While a defendant in a product liability action has "a right to expect consumers will use the product consistent with the instructions provided . . . the degree of misuse which will absolve a defendant is inextricably interwoven with the adequacy of the warning provided." (*Schwoerer v. Union Oil Co.* (1993) 14 Cal.App.4th 103, 112-113.) In a similar vein, "some degree of misuse and abuse of [the] product" must be foreseen. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833, quoting *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7.) These are all factual issues for the trier of fact to decide in determining liability and, if it finds some delict on the part of the plaintiff, in fixing comparative fault. Because Home Depot's proposed special instructions failed to recognize that the jury was to determine both the adequacy of the instructions on the ladder as well as the foreseeability of plaintiff's failure to read them, the trial court properly rejected the special jury instructions. (See *Levy-Zentner Co. v. Southern Pac. Transp. Co.* (1977) 74 Cal.App.3d 762, 781-782 [trial court properly refused defense instruction that failed to address foreseeability issue of third party's negligence].)

In any event, the issue addressed by Home Depot's five special instructions (plaintiff's failure to read the instruction labels on the ladder) was adequately covered by the pattern instructions on comparative fault and negligence. No instructional error occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.